A

BUSINESS FOCUS CAPITAL SDN BHD

v.

AFFIN BANK BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-1767-2004]
24 JULY 2005

C ***CIVIL PROCEDURE:*** *Striking out - Appeal against - Serious disputes of facts and law - Whether raised - Whether plaintiff's claim for specific performance of agreement has merit - Whether defendant has right to terminate agreement - Whether plaintiff's claim obviously unsustainable - Whether an abuse of the process of the court - Rules of the High Court* D *1980, O. 18 r. 19(1)(b) and (d)*

CIVIL PROCEDURE: *Pleadings - Striking out - Whether filing of unconditional appearance preclude defendant from filing application - Discretion of court - Whether there was lack of promptitude on part of defendant*

E

This was the plaintiff's appeal against the decision of the senior assistant registrar allowing the defendant's application in encl. 8 with costs. Enclosure 8 was the defendant's application under O. 18 r. 19 of the Rules of the High Court 1980 for an order F that the plaintiff's action be struck out on the grounds that it was scandalous, frivolous and an abuse of the process of the court. Briefly, the defendant had entered into an agreement with the plaintiff where the defendant agreed to sell and the plaintiff agreed to buy all the defendant's rights, ownership, interest and benefit G in the banking facilities given to the various borrowers ('borrowers'), including rights on securities based on existing security documents. The defendant granted a term loan facility totaling 140 million in favour of the plaintiff. The facility was granted in order to refund the balance purchase price under the H sale agreement. However, on 7 December 2004, the defendant sent a notice terminating the sale agreement and canceling the facility. The termination was challenged, *inter alia*, because the plaintiff had made several payments totaling RM9,068,153.44. The plaintiff claimed specific performance on the part of the defendant I of its obligation to the sale agreement and the facility documents and in the alternative a declaration that the termination notice by the defendant for the sale agreement and the facility documents

were null and void. It was the defendant's submission that the plaintiff had not been able to effect payment of the initial payment and had thus failed to fulfill its obligations under the sale agreement. According to the defendant, it had therefore rightfully terminated the agreement. The plaintiff in its submission said that this was not a clear and obvious case for striking out under O. 18 r. 19 RHC because it had raised serious disputes of facts and law on the wrongful termination of the sale agreement and the facility agreement by the defendant. The plaintiff further highlighted the fact that the defendant's application was not made promptly. The defendant had entered an unconditional appearance and had further filed its defence against the plaintiff's claim long before the application to strike out was made. By virtue of this the plaintiff submitted that the defendant was precluded from applying to strike out the plaintiff's suit.

Held (dismissing the appeal):

(1) On failure of the defendant to file unconditional appearance to strike out the suit, this was not considered fatal at all. The filing of unconditional appearance did not preclude defendant from filing this application. The striking out application was filed some two weeks after the defence was filed. The court could still entertain such application so long as pre trial case management had not commenced if it was a fit and proper case to do so. This court exercised its discretion to entertain this application as it was done soon after filing its defence and two and a half months before plaintiff filed for case management. There was no lack of promptitude on the part of the defendant. (para 17)

(2) The plaintiff's claim for specific performance had no merit since it had not paid a single sen towards payment of the purchase price. The terms were clearly laid out in s. 3.1(a) and 5.1(a) of the sale agreement which provided that the plaintiff was to make the initial payment simultaneously with the execution of the sale agreement. The defendant's right to terminate was found within the provisions of cl. 9.2 which said that the defendant has the right to terminate the agreement upon the plaintiff's default to pay the purchase price. As such, the defendant had lawfully exercised its rights under both the sale agreement and the facility agreement. (paras 18, 19 & 20)

(3) Clause 3.1 of the facility agreement provided that the term loans would only be available to the plaintiff upon the payment of the initial payment. Clause 4.1 of the facility agreement read together with cl. 8 of the schedule I of the facility agreement provided that the term loans could only be utilized upon payment of the initial payment. Since the above condition precedent was not met, the defendant had rightfully cancelled the said facilities. (para 21)

(4) The claim of the plaintiff was obviously unsustainable because it did not pay the initial payment to the bank and also did not pay the balance purchase price and thus the bank had a right to terminate the sale agreement and the facility agreement. This court would not grant the relief in this suit as it had not been pleaded nor were there any evidence that the plaintiff was at all material times willing and able to complete the sale. The evidence conclusively showed the contrary. The plaintiff's conduct at all times showed it was not prepared or able to complete the sale agreement and the facility agreement. (para 24)

(5) It was indeed a plain and obvious case that the plaintiff's claim was scandalous, frivolous and vexation and an abuse of the process of the court and had correctly been struck out under O. 18 r. 19(1)(b) and (d) RHC. (para 26)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Hassnar Hj Ebrahim v. Ibrahim Mohamad [1999] 2 CLJ 193 HC ***(refd)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Union & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC ***(refd)***

N Carrupaiya v. MBF Property Services & Anor [2000] 4 CLJ 116 HC ***(refd)***

Northwest Holdings Sdn Bhd v. Muhibbah Engineering (M) Berhad [2004] 7 CLJ 400 HC ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-Ameican Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Tractors Malaysia Berhad v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the plaintiff - M/s Thanggaiya Zawawi & Co
For the defendant - M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

[1] This is the plaintiff's appeal against the decision of the senior assistant registrar on 10 October 2005 allowing the defendant's application in encl. 8 with costs. Enclosure 8 is the defendant's application under O. 18 r. 19 of the Rules of High Court 1980 for an order that the plaintiff's action be struck out on the grounds that it is scandalous, frivolous and/or vexatious; and/or an abuse of the process of the court.

[2] The brief facts are that the defendant entered into an agreement with the plaintiff dated 31 January 2004 where the defendant agreed to sell and the plaintiff agreed to buy all the defendant's rights, ownership, interest and benefit in the banking facilities given to the various borrowers ("borrowers"), including rights on securities based on Existing Security Documents. The borrowers comprised six companies and one Tan Sri Dato' Amin Shah bin Omar Shah. The plaintiff and borrower companies are related companies and share common directors. The plaintiff is a wholly owned subsidiary of one of the borrowers, Business Focus Sdn Bhd. The said Tan Sri Dato' Amin Shah holds 99.9% shares in Business Focus Sdn Bhd. He also controlled and managed the plaintiff and the borrower companies.

[3] The said sale is affected by the transfer of the sale of the property to the defendant according to terms and conditions contained therein. Clause 3.1 of the sale agreement, had stipulated conditions to be fulfilled. The total debt that the borrower owed the defendant was RM407,300,366.50.

[4] The completion date for the agreement is 30 days from the date of the agreement. The parties signed the General Assignment Agreements for the transfer and assignment of the sale property. The defendant had also entered into a Restated Debt Restructuring Agreement dated 6 December 2000 ("RDRA") between among others PSC Industries ("PSCI"). The parties had

A also agreed to execute an assignment agreement in respect of the RDRA. The terms of the RDRA involves the creation and issuance of redeemable convertible loan stocks ("the RCLS") by PSCI in favour of creditors including the defendant. This is part of PSCI'S Debt Restructuring Scheme. The plaintiff stood to
B receive RM44,941,000 Nominal Value RCLS under the RDRA Assignment Agreement.

[5] The defendant granted a term loan facility totaling RM140 million in favour of the plaintiff. The facility is granted in order to
C refund the balance purchase price under the sale agreement. Under the facility, the plaintiff had to give an undertaking to the defendant to deposit and charge the RCLS worth RM120 million in favour of the defendant upon issuance of the same by PSCI. It is to be treated as security for the facility granted. It is to be
D considered condition precedent for the disbursement of the facility. The defendant issued a notice to PSCI for the issuance of the RCLS to the plaintiff. However on 7 December 2004 the defendant sent a notice terminating the sale agreement and canceling the facility.

E **[6]** The plaintiff sent a letter to the defendant stating that they did not accept the termination. The termination was challenged *inter alia* because the plaintiff had made several payments totaling RM9,068,153.44. The plaintiff claimed for specific performance on
F the part of the defendant of its obligation to the sale agreement and the facility documents and in the alternative a declaration that the termination notice by the defendant for the sale agreement and the facility documents are null and void.

[7] In its defence the defendant said that it had no objections
G to the issuance of the RCLS to the plaintiff. However it was subject to the due completion of the sale agreement by the plaintiff in accordance with the terms stated therein. Pertinently, the plaintiff had not been able to effect payment of the initial payment. The plaintiff has thus failed to fulfill its obligations under
H the sale agreement. The defendant had therefore rightfully terminated the agreement.

[8] In reply to the defence the plaintiff said the plaintiff would have been entitled to secure 44,941,000 Nominal Value rights
I RCLS if the defendant had not terminated the agreement. The defendant knew that the plaintiff will only pay the entire purchase price after PSCI had issued the RCLS.

[9] The defendant's application under O. 18 r. 19 of the Rules of High Court 1980, is premised on the grounds that firstly, the main terms for the sale agreement dated 31 January 2004 is that the plaintiff pays part of the purchase price of RM300 million in the amount of RM160 million simultaneously with the execution of the sale agreement ("the initial payment"), and that the defendant is entitled to terminate the sale agreement upon the failure of the plaintiff to fulfill any of its contractual obligations. Secondly, the balance purchase price of RM140 million ("the balance purchase price") is to be paid within 30 days from the date of the sale agreement. Thirdly, the defendant granted to the plaintiff two term loans totaling RM140 million pursuant to the facility agreement dated 11 March 2004 to finance the payment of the balance purchase price. It is a condition precedent that the term loans will only be available to the plaintiff upon payment of the initial payment. Fourthly, the plaintiff has failed to effect payment of the initial payment, or complete the balance purchase price, resulting in the defendant rightfully exercising its contractual rights to terminate both the sale agreement and the facility agreement. By the above grounds, the defendant argued that the action is frivolous, vexatious and/or an abuse of the process of the court.

[10] The plaintiff in its submission said this is not a clear and obvious case for striking out under O. 18 r. 19. It is not conspicuously clear that the claim on the face of it is obviously unsustainable since the plaintiff's suit involves interpretation and minute examination of various agreements and documents. This is in reference to the defendant's own submissions that this suit does require a minute examination of the various agreements, correspondences and other documents between the parties. The defendant's learned counsel himself was also said to have dwelled into the details of the clauses in the sale agreement and the facility agreement, the termination notices and other related documents with a view to establish that the plaintiff's claim for specific performance is unsustainable. The plaintiff's learned counsel has raised serious disputes of facts and law on the wrongful termination of the sale agreement and the facility agreement by the defendant. The plaintiff's learned counsel submitted that this serious dispute calls for a detailed examination of the agreements involved. The defendant referred to the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 in support of this contention.

[11] The second legal argument forwarded by the plaintiff is that the mere fact that the plaintiff is not likely to succeed at the trial is no ground for the suit to be strike out. The plaintiff refers to the case of *Hassnar Hj Ebrahim v. Ibrahim Mohamad* [1999] 2 CLJ 193. It was submitted that the question as to whether or not the plaintiff's claim for specific performance will fail at the trial of this action is not a criteria to be considered at this stage. Further, the claim for specific performance is not the only claim by the plaintiff against the defendant in this suit. The plaintiff had highlighted the fact that the defendant's application was not made promptly. The defendant had entered an unconditional appearance and had further filed its defence against the plaintiff's claim long before the application to strike out was made. By virtue of this the plaintiff submitted that the defendant is precluded from applying to strike out the plaintiff's suit.

[12] Referring to the words "obviously unsustainable" the plaintiff's learned counsel submitted that the words 'frivolous and vexatious' are meant to cases which are "obviously frivolous and vexatious or obviously unsustainable". The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the court. This were the words of Edgar Joseph Jr (as he then was) in *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Union & Ors* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218.

[13] The defendant in its submissions said that the even if the plaintiff's claim were to proceed to trial, the claim would still be resolved by construing the terms of the sale agreement and the facility agreement.

[14] On the issue of unconditional appearance, the defendant referred to the plaintiff's submissions that the defendant is precluded from making the application as the bank had entered an unconditional appearance and had filed its defence. The defendant said that since the plaintiff had not raised this objection in its affidavits, it is estopped from doing so at the submission stage. In any event the defendant said that the filing of the unconditional appearance does not preclude the bank from filing the application. The defendant cited the cases of *N Carrupaiya v. MBF Property Services & Anor* [2000] 4 CLJ 116 and *Northwest Holdings Sdn Bhd v. Muhibbah Engineering (M) Berhad* [2004] 7 CLJ 400 in support

of this argument. The defendant reiterated that the plaintiff itself had delayed in filing the notice for pre-trial case management and the defendant had filed this application long before that.

[15] Having heard submissions, I had to peruse the relevant provisions of the agreements to determine the rights and obligation of the parties under the said agreements.

[16] I am guided by the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-Ameican Life & General Insurance Bhd* [1993] 3 CLJ 606 where the Supreme Court held that the court should scrutinize the evidence in order to decide whether an action is bound to fail. If so, it would be otiose to send the case back to its starting point when such a conclusion can be reached on an application filed under O. 18 r. 19 of the RHC 1980. The Supreme Court adopted the Privy Council decision in *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ 1 where in striking out the appeal, the court went through the affidavit evidence with a fine-toothcomb.

[17] On failure of the defendant to file unconditional appearance to strike out the suit, I do not consider it fatal at all. The filing of unconditional appearance does not preclude defendant from filing this application. I agree the plaintiff itself had delayed filing the notice for pre trial management. The striking out application was filed some two weeks after the defence was filed. The court could still entertain such application so long as pre trial case management had not commenced if it is a fit and proper case to do so. In the circumstances of this case I exercised my discretion to entertain this application as it was done soon after filing its defence and 2 1/2 months before plaintiff filed for case management. There is no lack of promptitude on the part of the defendant.

[18] From my observations, I find that the plaintiff's claim for specific performance has no merit since it has not paid a single sen towards payment of the purchase price.

[19] I find that the terms are clearly laid out in section 3.1(a) and 5.1(a) of the sale agreement which provides that the plaintiff is to make the initial payment simultaneously with the execution of the sale agreement. Clause 3.1(b) of the sale agreement provides that payment of the balance purchase price shall be made by the "completion date" (defined by cl. 1.1 of the sale agreement as 30 days from the date of the sale agreement, ie, on 31 January 2004).

[20] The defendant's right to terminate is found within the provisions of cl. 9.2. It says that the defendant has the right to terminate the agreement upon the plaintiff's default to pay the purchase price. Clause 11.7 provides that time shall be of the essence in the agreement. As such I hold that the defendant has lawfully exercised its rights under both the sale agreement and the facility agreement.

[21] Clause 3.1 of the facility agreement provides that the term loans shall only be available to the plaintiff upon the payment of the initial payment. Clause 4.1 of the facility agreement read together with cl. 8 of Schedule I of the facility agreement provides that the terms loans could only be utilized upon payment of the initial payment. Since the above condition precedent was not met, the defendant has rightfully cancelled the said facilities by its letter dated 7 September 2004.

[22] From the facts as gleaned from the pleadings and affidavit filed, I find that the defendant has allowed the plaintiff extension of time to effect the initial payment upon the plaintiff's request for the plaintiff to negotiate with Credit Suisse First Boston ("CSFB") to obtain financial facilities. The financial facilities were needed in order that the plaintiff could make the initial payment. CSFB eventually did not fund the plaintiff's 'initial payment' as CSFB had insisted on all the security documents being delivered to their stakeholder. It was never the intention of parties under the sale agreement for the plaintiff to surrender all its security documents to a third party before full payment of the RM300 million had been paid. The plaintiff should have sorted out its terms of financing before entering into the sales agreement with the defendant.

[23] This however does not negate cl. 11.7 that time is of the essence. The above consent does not mean that the defendant has waived the completion date. I find that the defendant has been consistent in its demand for the outstanding purchase price and had in fact sent a letter dated 12 March 2004 to the plaintiff about it. The inability of the plaintiff to complete the sale agreement left the defendant with no option but to terminate the sale agreement and facility agreement.

[24] The claim of the plaintiff is obviously unsustainable because it did not pay the initial payment to the bank and also, did not pay the balance purchase price and thus the bank had a right to terminate the sale agreement and the facility agreement. This court would not grant the relief in this suit as it had not been pleaded nor are there any evidence that the plaintiff was at all material times willing and able to complete the sale. The evidence conclusively showed the contrary. The plaintiff's conduct at all times showed it was not prepared or able to complete the sale agreement and the facility agreement.

[25] The RDRA upon which the plaintiff contend that it would have been entitled to 44,944,000 nominal value RCLS if not for the termination by the defendant had expired on 15 April 2004 some five months earlier. The RDRA had never been extended. PSCI had failed in its debt restructuring scheme with its creditors. This contention is therefore mischievous.

[26] For the above reasons, it is indeed plain and obvious that the plaintiff's claim is scandalous, frivolous and vexation and an abuse of the process of the court and had correctly been struck out under O. 18 r. 19(1)(b) and (d) RHC by the senior assistant registrar. This appeal is thereby dismissed with costs.